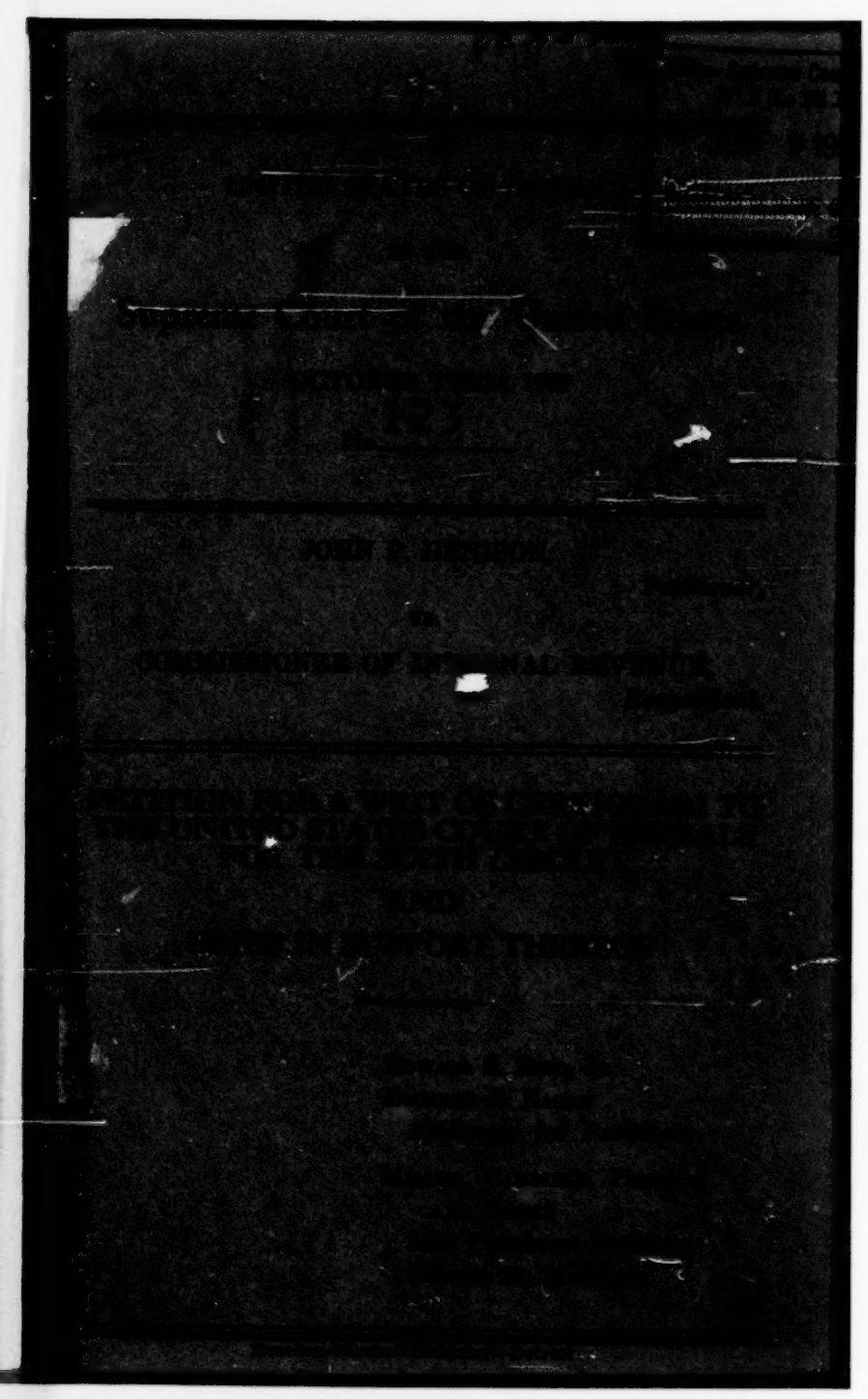

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UNITED STATES OF AMERICA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No.....

JOHN P. DENISON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AND

BRIEF IN SUPPORT THEREOF

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, JOHN P. DENISON, respectfully represents that:

SUMMARY STATEMENT OF THE MATTERS INVOLVED

This case is part of the harvest of litigation in the Tax Court of the United States, involving the validity of family partnerships, which followed the decisions of this Court in *Commissioner* v. *Tower,* 327 U.S. 280, and *Lusthaus* v. *Commissioner,* 327 U.S. 293. It was decided by the Tax Court *before* the Tax Court had had the benefit of this Court's views as to the proper criteria to be applied in determining the validity of family partnerships, for Federal Income Tax purposes, expressed in *Culbertson* v. *Commissioner,* 337 U.S. 733. While basically this case involves the validity, for Federal Income Tax purposes, of a husband and wife partnership, it presents important issues incident to that fundamental problem which this Court did not reach in the *Culbertson* case, namely,

> 1. The application of the criteria which this Court laid down in the *Culbertson* case to the evidentiary facts in a case involving a family partnership, and
>
> 2. The role of the Courts of Appeal in applying those criteria to decisions of the Tax Court under the amendment to *Section 1141 (a) of Title 26 U.S.C.,* giving the Courts of Appeal the same latitude in reviewing decisions of the Tax Court which they have long had in reviewing judgments of District Courts in non-jury cases, and under the provisions of the recently enacted *Administrative Procedure Act, 5 U.S.C. § 1009.*

The proper application of the criteria for determining the validity of a family partnership announced by this

Court in the *Culbertson* case has presented a troublesome problem to the Courts of Appeal, the Tax Court and the Federal District Courts. See "*Family Partnership and the Income Tax—The Culbertson Chapter,*" *Paul W. Bruton, Vol. 98, No. 2, page 143, University of Pennsylvania Law Review.* It would be most helpful to those Courts, to the officers of the United States charged with the administration of the Internal Revenue Laws and to the Bar, in the many cases still pending, and those yet to arise, involving the validity of family partnerships, if this Court were to demonstrate how the criteria which it laid down in the *Culbertson* case are to be applied to a specific fact situation. The instant case is an excellent case in which to perform such a demonstration. It involves a challenged partnership between a husband and wife, known as the J. P. Denison Company (herein, and in the supporting brief, sometimes called the "Company"), which was conceived by the wife (R-119), which the husband at first viewed with disfavor (R-119), but which the husband finally agreed to because the wife by her initiative and efforts was able to demonstrate it to be feasible (R-120), in which a formal partnership agreement was executed before the disputed partnership commenced business (R-120), in which the wife rendered to the partnership indispensable clerical services on a full-time basis during a two-year period immediately following the inception of the partnership (R-129) and thereafter on a part-time basis (R-125), and in which the wife made available to the partnership, and never thereafter withdrew (R-123, 126), capital originating with her (R-123), at a time when the partnership desperately needed capital (R-123) and subsequent to which capital was a vital income-producing factor (R-126). It also involves a challenged partnership the books of account of which did not

reflect a partnership status for the wife until the taxable years in question, namely, 1942 and 1943 (R-124), and in which Federal Income Tax Returns reflecting a partnership status were not filed until 1942 (R-125). There is also certain documentary evidence, such as assumed name certificates, indicating that the disputed partnership was an individual proprietorship and the husband the sole proprietor (R-122, 123), and a bank signature card covering a bank account used by the challenged partnership containing a similar indication (R-122), but on which either the husband or wife could draw checks (R-122). In short, the facts of this case are typical of the type of husband and wife partnership where the husband and wife together founded the business, where both rendered services in connection with the operation of its business, and where the wife made available moneys originating with her for use in the conduct of that business, but where certain formalities which, had they been observed, would have made the challenged partnership unassailable, were not observed.

Equally important from the standpoint of the Courts and the Bar is the question, which this case presents, as to the role which the Courts of Appeal are to perform in reviewing decisions of the Tax Court, and in applying thereto the criteria laid down in the *Culbertson* case under the recently enacted statutory provisions above referred to, which abrogated the rule which this Court laid down in *Dobson* v. *Commissioner*, 321 U. S. 231. More particularly, this case presents the question of the scope and intensity of appellate review with respect to the Tax Court's ultimate conclusion with respect to the question which must be answered under this Court's decision in the

Culbertson case, namely, whether the members of a challenged family partnership, in good faith, intended to conduct the business of that enterprise as copartners. The decision of the majority of the Court below in this case treats that ultimate conclusion as if it were merely a finding of fact. Even though there was no conflict in the evidence, it assumed that it was obligated to go no further than to determine whether that ultimate conclusion was supported by substantial evidence or was clearly erroneous. It made a like assumption with respect to the following two ultimate conclusions of the Tax Court which were subsidiary, but nevertheless crucial, to its conclusion as to the existence of the required intent to conduct business, in good faith, as copartners, namely:

> 1. That certain funds which the undisputed evidence shows were the premarital earnings of Petitioner's wife were made available by her to the Company for its use, were used by it in the conduct of its business and were never withdrawn, did not constitute a contribution by Mrs. Denison to the capital of that Company.
>
> 2. That the services which the undisputed evidence shows were rendered by Petitioner's wife to the Company were not rendered as a partner.

It is Petitioner's position that the ultimate conclusions above referred to are not findings of fact within the meaning of *Section 1141(a) of Title 26 U.S.C.* and *Section 1009 of Title 5 U.S.C.*, but rather are questions of law, or mixed questions of law and fact, as to which the Court below was permitted, and required, to substitute its own judgment if it disagreed with those conclusions notwithstanding the fact that it might be justified in finding that those

conclusions were supported by substantial evidence and were not clearly erroneous. In short, it is Petitioner's contention that the majority of the Court below did not properly discharge its functions as a reviewing Court under the statutory provisions above referred to with respect to the ultimate conclusions which the Tax Court drew from its evidentiary findings, all of which were based on evidence as to which there was no conflict.

Finally it is Petitioner's position that even if the ultimate conclusions above referred to are properly regarded as findings of fact within the meaning of the statutory provisions above referred to, those ultimate conclusions are not based on substantial evidence and are clearly erroneous since they are contrary to the great weight of the evidence.

JURISDICTIONAL STATEMENT

It is contended that this Court has jurisdiction to review the judgment, or order, here in question under the provision of *26 U.S.C. 1141 (a)* and *28 U.S.C. 1254* on the basis of the facts hereinbefore and hereinafter in this Petition set forth and the jurisdiction of this Court is invoked under said statutory provisions.

Petitioner is advised and believes that the judgment of the Court of Appeals is erroneous and contrary to the just rights of Petitioner, and that this Court should require said cause to be certified to this Court for its review and determination in conformity with the provisions of the Acts of Congress in such case made and provided.

QUESTIONS PRESENTED

This Petition presents four questions:

I.

Where facts of a case are not in dispute and there is no conflict in the evidence, is a Court of Appeal permitted, and required, under the provisions of *5 U.S.C. § 1009* and *26 U.S.C. § 1141(a)*, in reviewing a Decision of the Tax Court of the United States to treat the ultimate conclusions drawn by the Tax Court from the evidentiary facts which the Tax Court found as conclusive, if the Reviewing Court finds that such ultimate conclusions are supported by substantial evidence and are not clearly erroneous?

The Court of Appeals answered this question in the affirmative.

II.

Were the following ultimate conclusions, namely,

1. That neither Petitioner nor his wife intended to conduct the business of the Company as a bona fide working partnership at any time, and

2. That Petitioner's wife did not invest capital in the Company, and

3. That the services rendered by Petitioner's wife to the Company did not constitute the contribution of a partner,

correctly drawn by the Tax Court from the evidentiary facts which it found?

The Tax Court answered this question in the affirmative.

The Court of Appeals did not answer this question and concluded merely that those conclusions were supported by substantial evidence and were not clearly erroneous.

III.

Were the ultimate conclusions set forth in Question II above, if properly treated as findings of fact, supported by substantial evidence and not clearly erroneous?

Both the Tax Court and the Court of Appeals answered this question in the affirmative.

IV.

Was the Company, during the taxable years in question, namely, 1942 and 1943, a valid partnership between Petitioner and his wife, Edna Denison, which was recognizable as such pursuant to the provisions of *Sections 181 and 182 of the Internal Revenue Code* and the net income of which was taxable one-half to Petitioner and one-half to his wife?

Both the Tax Court and the Court of Appeals answered this question in the negative.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Certiorari should be granted for the following reasons:

1. The Court of Appeals in this case decided an important question of Federal Law which has not been, but should be, settled by this Court, namely, that a Court of Appeals in reviewing a decision of the Tax Court of the United States under *5 U.S.C. § 1009* and *26 U.S.C. 1141 (a)* is required and permitted to treat as conclusive the ultimate conclusions drawn by the Tax Court from undisputed evidentiary facts found by it from evidence in which there is no conflict, if the Court of Appeals is able to say that such ultimate conclusions are supported by substantial evidence and are not clearly erroneous. *Commissioner* v. *Tower,* 327 U.S. 280, and *Lusthaus* v. *Commissioner,* 327 U.S. 293, were decided before the applicable provisions of the above statutes became effective. This Court did not reach that question in *Culbertson* v. *Commissioner,* 337 U.S. 733.

2. The decision of the Court of Appeals in this case is probably in conflict on the question of Federal Law referred to in Item 1 above with the decision of the Circuit Court of Appeals for the District of Columbia in *Wenig* v. *Commissioner,* 177 Fed. (2nd) 62 (C.C.A. D.C.) and the decision of the Circuit Court of Appeals for the Tenth Circuit in *Graber* v. *Commissioner,* 171 Fed. (2nd) 32 (C.C.A.

10th), on the same question and with other decisions of the Court below on the same question. *Lawton* v. *Commissioner,* 164 Fed. (2nd) 380 (C.C.A. 6th); *Weizer* v. *Commissioner,* 165 Fed. (2nd) 772 (C.C.A. 6th); and *Wright-Bernet* v. *Commissioner,* 172 Fed. (2nd) 343 (C.C.A. 6th).

3. The decision of the Court of Appeals is in conflict with the decisions of other Courts of Appeal on the same subject matter, namely, the decision of the Circuit Court of Appeals for the District of Columbia in *Wenig* v. *Commissioner,* 177 Fed. (2nd) 62 (C.C.A. D.C.), where the Court of Appeals unanimously reversed the decision of Tax Court and sustained the validity of a husband and wife partnership under a set of facts which are basically indistinguishable from those in the instant case, the decision of the Court of Appeals for the Fifth Circuit in *Singletary* v. *Commissioner,* 155 Fed. (2nd) 207 (C.C.A. 5th), and the decision of the Court of Appeals for the Eighth Circuit in *Hartz* v. *Commissioner,* 170 Fed. (2nd) 313 (C.C.A. 8th).

4. The Court below has decided a Federal question in a way probably in conflict with decision of this Court in *Culbertson* v. *Commissioner,* 337 U.S. 733, in that it failed to apply properly to the facts of this case the criteria there enunciated for determining the validity of family partnerships for Federal Income Tax purposes.

5. The Court below has decided a Federal question in a way probably in conflict with the decision of this Court in *Consolidated Edison Company of New York* v. *N.L.R.B.,* 305 U.S. 197, in that it de-

termined that the findings and conclusions of Tax Court were supported by substantial evidence contrary to the criteria set forth in that case for determining whether substantial evidence to support such findings and conclusions exists.

6. The decision of the Court below is in conflict with other decisions of that Court on the same subject, namely, *Johnston* v. *Commissioner,* 180 Fed. (2nd) 355 (C.C.A. 6th), and *Weizer* v. *Commissioner,* 165 Fed. (2nd) 772 (C.C.A. 6th), in which Judges Miller, Simons (neither of whom sat in the instant case) and Judge Martin (who did) unanimously reversed a decision of the Tax Court and sustained the validity of a husband and wife partnership on facts which are, in all essential respects, identical with those in the instant case.

7. The judgment of the Court below sustained a decision of the Tax Court rendered before this Court decided *Culbertson* v. *Commissioner,* 337 U.S. 733, and which is probably contrary to the decision which the Tax Court would have reached in the instant case had it rendered its decision after the *Culbertson* case was decided, in that the Tax Court's decisions rendered since the *Culbertson* case have consistently sustained the validity of family partnerships under circumstances not materially different from those present in the instant case. See *Delchamps* v. *Commissioner,* 13 T.C. 281; *Estate of Frederick A. Depue* v. *Commissioner,* 13 T.C. 463; *Theurkauf* v. *Commissioner,* 13 T.C. 529; *Matuszewski* v. *Commissioner,* 13 T.C. 738; *Kiyono* v. *Commissioner,* 8 T.C.M. 935; and *Milenz* v. *Commissioner,* 9 T.C.M. 22.

8. In reaching its decision, the Court below so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision in that the Court below did not have before it when it considered this case, and reached its decision therein, the Exhibits introduced at the trial of this case in the Tax Court, though it had ordered such Exhibits transferred to it (R-135), and yet the Court below recited in its judgment that the case "had been fully considered on the whole record."

It is submitted that above grounds involve vital questions of tax administration and of appellate review of the greatest importance to the Courts, to taxpayers generally, to the Bar and to the administrative officers of the Government of the United States. Those questions, therefore, constitute a question of general and public importance, which only this Court can resolve.

Wherefore, Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Sixth Circuit, to the end that this cause may be reviewed and determined by this Court, as provided by law, and that Petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and that the judgment of said Court of Appeals may be reversed by this Honorable Court.

JOHN P. DENISON,
Petitioner

By EDWARD S. REID, JR., AND
EMMETT E. EAGAN,
Attorneys for Petitioner

[redacted]

[redacted]

Supreme Court of the United States

[redacted]

[redacted]

[redacted]

UNITED STATES OF AMERICA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No.....

JOHN P. DENISON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

I.

OPINION BELOW

The prevailing opinion in the Court of Appeals (R-139), and the dissenting opinion of Judge McAllister (R-140), are reported at *180 F. 2d 938.*

The findings of fact and opinion of the Tax Court (R-118 to 131) are reported at *11 T.C. 686.*

II.

JURISDICTION

1. The date of the Judgment to be reviewed is February 16, 1950 (R-139). Petitioner's Petition for Rehearing was denied by order entered March 13, 1950 (R-151).

2. The statutory provisions, which are believed to sustain the jurisdiction of this Court, and under which jurisdiction is invoked and certiorari is prayed, are *26 U.S.C. 1141* (*a*) and *28 U.S.C. 1254.*

3. The facts and cases believed to sustain the jurisdiction of this Court are set forth in the Petition in support of which this Brief is filed under the captions "Summary Statement of Matters Involved" and "Reasons Relied on For Allowance of the Writ."

III.

STATEMENT OF THE CASE

A. Preface.

The evidence in this case is not conflicting and consists of documentary evidence and the testimony of Petitioner and his wife. Respondent called no witnesses on his behalf, and hence the testimony of Petitioner and his wife is uncontradicted and unimpeached. On the basis of such evidence, the Tax Court made elaborate findings covering the evidentiary facts. Because of the nature of this case and the issues involved, we set forth below under appropriate captions the pertinent facts of this case, the vast majority of which are the subject of specific findings made by the Tax Court.

B. Background of Petitioner and his Wife.

During the taxable years in controversy Petitioner was a resident of Royal Oak, Michigan (R-119). In 1942, Petitioner was thirty-two years of age (R-53).

After completing two years of high school, Petitioner left school without graduating and started to work (R-53). From the time he left high school in 1928, Petitioner worked for various industrial concerns in the Detroit area for approximately six and one-half years, during which time he performed principally clerical work of various kinds (R-119). During 1933, Petitioner obtained a position with Universal Cooler Corporation by which concern Petitioner continued to be employed for approximately seven years, or until January 1, 1941 (R-53-55, 119). During the last three years of such employment Petitioner acted as purchasing agent for that corporation (R-55).

Petitioner's wife, Edna Denison, resided with Petitioner in Royal Oak, Michigan, all during the taxable years 1942 and 1943, and in 1942 was thirty-three years of age (R-53, 119). Petitioner's wife was a high school graduate (R-119). For approximately five and one-half years after her graduation from high school, Petitioner's wife was employed by two industrial concerns in the Detroit area, as a general clerk, performing general clerical work (R-110, 119).

Petitioner and his wife were married in 1930, and from the time of that marriage until August of 1940, Petitioner's wife was not employed (R-119). Between 1930 and 1940, three sons were born to Petitioner and his wife, one in 1931, one in 1932 and another in 1939 (R-106). A fourth son was born in 1946 (R-106).

C. The Inception of the Company.

During the early part of May of 1940, Universal Cooler Corporation, which for some period of time had been considering the advisability of changing the location of its plant, definitely decided to move its plant from Detroit, Michigan, to Marion, Ohio, which is approximately 150 miles away from Detroit, Michigan (R-119). This change in the location would have necessitated Petitioner and his family moving to Marion, Ohio, if Petitioner was to continue in the employ of that corporation (R-119). Petitioner considered his position a good one, and he was reluctant to relinquish it, even though Petitioner's continued employment with Universal Cooler Corporation would have required Petitioner and his family to leave Detroit (R-23, 119). Petitioner's wife was very much

opposed to moving away from Detroit, Michigan, and she determined to find a way to avoid the change in residence which Petitioner's continued employment with Universal Cooler Corporation would have necessitated (R-23, 24, 106, 107, 119).

As an alternative to leaving Detroit, Petitioner's wife suggested that Petitioner give up his employment and that she and Petitioner go into business *together* as manufacturers' agents in Detroit, Michigan (R-119). For some time, Petitioner did not regard this suggestion with favor, and was agreeable to adopting it only if he could be convinced that his wife's suggestion was economically feasible (R-119). To convince Petitioner of the practicability of her suggestion, Petitioner's wife arranged a dinner in their home in July of 1940, for the purpose of enabling Petitioner to meet Mr. Matley, purchasing agent for Whitman & Barnes Company, and Mr. Peters, purchasing agent for Detroit Harvester Company (R-108, 119, 120). This meeting was made possible only because of the friendship of Petitioner's wife with the wives of Messrs. Matley and Peters, since Petitioner had not previously known either of these men (R-25, 120). Messrs. Matley and Peters represented potential customers of the business which Petitioner's wife was then urging that she and Petitioner embark upon *together* (R-25, 26, 120). At that dinner party, Petitioner and his wife advised Messrs. Matley and Peters that they were considering entering the business of manufacturers' agents *together* (R-27, 120), and Messrs. Matley and Peters indicated that they would be willing to place orders with Petitioner and his wife if they should engage in the business on which they proposed to embark, provided the prices and deliveries quoted by

Petitioner and his wife for products which Whitman & Barnes Company and Detroit Harvester Company needed were comparable to those quoted by other suppliers of similar products (R-27, 120).

Thereafter Petitioner contacted various concerns engaged in the production and sale of manufacturers' supplies which Messrs. Matley and Peters had indicated that Whitman & Barnes Company and Detroit Harvester Company were interested in purchasing (R-28, 29, 120). Petitioner thus satisfied himself that arrangements could be worked out for the business entity which his wife proposed be formed, to represent these manufacturers (R-29, 120).

The next step in the carrying out of the plan of Petitioner and his wife to go into business together was to find an office in which they could operate with the minimum of expense. In July of 1940, they revealed their plans for going into business together to one Schroeder, a manufacturers' agent who had an office in downtown Detroit (R-27, 28). Schroeder was a friend of both Petitioner and his wife (R-27, 28, 108). As a result of such disclosure, an agreement was made with Schroeder whereby Petitioner and his wife were to have the use of a desk and a telephone in Schroeder's office, rent free (R-28, 108, 120). In return, Petitioner's wife was to answer the telephone for Mr. Schroeder, to be his office girl, and to do certain clerical work for him (R-28, 108, 120).

On July 31, 1940, the sole financial resources of Petitioner and his wife consisted of an automobile, registered in Petitioner's name, a house, title to which was regis-

tered in the name of Petitioner's wife and which was subject to a mortgage, a few securities which Petitioner and his wife each owned separately, a deposit of $428.19 in their joint checking account and Petitioner's salary of $375.00 per month (R-120).

Acting on the advice of friends that if they were going into business *together*, a partnership agreement between them should be drawn up, Petitioner and his wife *together* instructed an attorney, whom friends suggested that they consult, to draft a partnership agreement between them (R-114, 115, 120). As a result, a partnership agreement was drafted which Petitioner and his wife *together* signed in the office of the attorney who drafted it on August 3, 1940 (R-20, 21, 114, 115, 120). While this agreement specified the purposes of the partnership in rather general terms, those purposes were broad enough to permit Petitioner and his wife to engage in the business of being manufacturers' agents (R-120, 121). *Petitioner's Exhibit 1.* Among other things, the partnership agreement provided that Petitioner and his wife agreed to become co-partners under the name and style of "J. P. Denison Company" for a period of ten years commencing September 2, 1940, to make equal capital contributions to the partnership and to share profits and losses equally. *Petitioner's Exhibit 1.*

D. Operations of the Company during 1940.

Shortly after the execution by Petitioner and his wife of the partnership agreement, the J. P. Denison Company (herein called the "Company") began doing business in Schroeder's office (R-121). In August of 1940, Universal Cooler Corporation actually moved its plant to Marion, Ohio (R-121). Even though the Company had com-

menced operations, Petitioner continued in the employ of Universal Cooler Corporation in Marion, Ohio, until December 31, 1940 (R-121).

The activities of the Company during the period between August of 1940 and December 31, 1940, consisted principally of making business connections with both suppliers and customers which would be useful in the conduct of its business at a later date (R-121). No sales were made by the Company during that period, and its receipts were negligible (R-121). All during that period, Petitioner returned to Detroit on most week-ends and devoted only Saturdays and Sundays, evening hours and spare time to the business of the Company (R-121). Petitioner's activities consisted of contacting prospective customers and suppliers (R-121). Petitioner's wife went to the office of the Company every day during this period, spent all day there and was the sole representative of the Company in Detroit (R-121). While at the office of the Company, Petitioner's wife performed general clerical work for both Mr. Schroeder and for the Company (R-121). To enable Mrs. Denison to devote her full time to the affairs of the Company, a hired girl was employed on a full-time basis to care for her home and her children (R-121). She also enlisted the aid of her relatives in this regard (R-109). No bank account was opened in the name of the Company during 1940, and such receipts as the Company had and such disbursements as it made, during 1940, were handled through the joint personal checking account on which either Petitioner or his wife were authorized to draw (R-121).

E. Operations of the Company during the Early Part of 1941.

On January 1, 1941, Petitioner left the employ of Universal Cooler Corporation and thereafter devoted his full time to the business of the Company (R-121, 122). On January 13, 1941, an assumed name certificate covering the business of the Company was filed, which stated that Petitioner was the sole owner and operator of the business bearing that name (R-122). Commencing in January of 1941, the Company began actively to make sales as a manufacturers' agent for various concerns (R-122). Such sales were made principally to Whitman & Barnes Company and to Detroit Harvester Company (R-30, 36, 46, 47).

From January to September of 1941, the operations of the Company required a negligible amount of capital and fixed assets, since that business consisted of selling products of suppliers on a straight commission basis (R-122). The principal expenses of a business of this type were office rent and telephone expense. These the Company obtained in return for the services of Petitioner's wife, who continued to work every day rendering such clerical services (other than bookkeeping services) as the Company required in the conduct of its business and also rendering similar services to Mr. Schroeder until August of 1941, when he moved to another office (R-122). During the early part of 1941, Petitioner spent his time traveling about soliciting customers and accounts, placing orders and following up accounts to make sure that orders were properly executed (R-122). Neither Petitioner nor his wife understood accounting principles, and hence a girl was hired on a part-time basis in January of 1941, to

keep the books of account of the Company (R-84, 122). Except for this part-time girl, who received only $50.00 per month for her services, the Company then had no employees (R-50, 122).

Prior to March of 1941, no bank account had been opened in the name of the Company. On March 5, 1941, Petitioner and his wife drew out of their joint personal checking account (which had theretofore served as the only bank account used in the business of the Company) the then existing balance of $875.06 (R-30, 31, 122). This amount Petitioner and his wife transferred to a checking account newly opened in the name of the Company (R-122). Either Petitioner or his wife were authorized to draw checks on this account (R-122). The signature card covering this account indicated that Petitioner was the sole proprietor of the business to which that card related (R-122).

F. Operations during the latter part of 1941.

Among the business entities for which the Company acted as manufacturers' agent on a straight commission basis during the early part of 1941, was Bangor Products Company (R-122). In August or September of 1941, Bangor Products Company, the products of which the Company had been selling to Detroit Harvester Company and Universal Cooler Corporation, objected to the delay which it was experiencing in obtaining payment for its products from those two corporations (R-123). So great was its dissatisfaction that Bangor Products threatened to discontinue sales to those corporations (R-123). To avoid losing two of its best accounts, the Company agreed with Bangor

Products Company that henceforth the former would purchase the latter's products and resell them to Detroit Harvester Company and to Universal Cooler Corporation (R-87, 123). As a matter of convenience to these two old customers, and with the consent of Bangor Products Company, the Company adopted the name of "Bangor Products Company" insofar as this particular branch of its business was concerned (R-91, 92). All of the income derived from transactions handled in this manner under the name of Bangor Products Company was treated as part of the income of the Company (R-123). In connection with this branch of the business of the Company, an assumed name certificate covering the name "Bangor Products Company" was filed by Petitioner on October 28, 1941, in which it was stated that Petitioner was the sole owner and operator of this business (R-123).

The arrangement outlined above for marketing the products of Bangor Products Company required capital (R-123). The need for capital arose because the Company was required to pay Bangor Products Company for its products before it received the sale price from Detroit Harvester Company and Universal Cooler Corporation (R-123). The lag in time between the date on which the Company was required to pay Bangor Products Company and the date on which the Company received payment was usually from 60 to 90 days (R-123). To obtain the funds with which to finance these operations Petitioner sold certain securities which he owned, at a loss, and contributed the proceeds of this sale, amounting to approximately $350, to the Company (R-123). Petitioner's wife also owned certain securities which were registered in her maiden name and which she had bought with savings

which she earned prior to her marriage (R-110, 111, 112, 123). The certificates evidencing these securities were endorsed by Petitioner's wife in blank and delivered to Petitioner (R-123). These securities were then sold at a price less than their cost, and the proceeds amounting to approximately $1,350 were deposited in the bank account of the Company (R-123). These securities were delivered to Petitioner by his wife with the intention that they be sold and the proceeds be used in the business of the Company and that they were to be a contribution by Mrs. Denison to the capital of the Company (R-112, 113). These securities were, however, credited to Petitioner on the books of account of the Company (R-123).

The changed method of handling the Bangor Products Company account resulted in the tripling of the profits of the Company, and for the balance of 1941, the purchase and sale of the products of Bangor Products Company accounted for substantially all of the business of the Company (R-123).

G. Operations of the Company during 1942 and 1943.

Toward the close of 1941, the Company embarked upon a new line of business—that of selling tools and dies (R-123). The Company solicited orders for tools, jigs, dies and fixtures from concerns who had need for them and, upon obtaining such orders, contracted to have the same built for it by small tool shops (R-124). The Company bought these products at a fixed price and resold them at a higher price to customers who had placed orders for the same with it (R-49, 124). This type of business required the use by the Company of substantial amounts of capital (R-124).

During 1942 and 1943, the volume of the business of the Company increased sharply, and the purchase and resale of tools, jigs, dies and fixtures accounted for by far the greater portion of its rising income (R-124). In August of 1943, the Company itself began to build tools, jigs, dies and fixtures for sale to customers (R-124). To purchase the necessary machinery and equipment to produce such products, tha Company expended the sum of approximately $25,750. This branch of the business of the Company was carried on under the name of Detroit Machine Products Company (R-124), but the income derived from business of this type was included along with other income of the Company (R-124). By the end of 1943, the business which the Company conducted under the name of Detroit Machine Products Company accounted for approximately 1/7 of its total business (R-125). During 1942 and 1943, the business of the Company consisted almost entirely of the purchase from others, and the resale, of tools, jigs, dies and fixtures and of the building and sale of products of this type (R-125).

All during the calendar year 1942, Petitioner's wife continued to render services in and about the business of the Company and on the average spent approximately two days a week at its place of business (R-125). Petitioner's wife continued, all during the calendar year 1943, to render some services in and about the business of the Company, though such services were less extensive than in 1942 (R-110, 125).

H. The Federal Income Tax Returns of the Company and of Petitioner and His Wife.

The record is silent as to whether Petitioner, his wife or the Company filed any Federal Income Tax Returns for 1940 (R-69). For 1941, Petitioner filed a separate return in which he reported the entire net income from the Company (R-124). Petitioner's wife filed no separate Federal Income Tax Return for 1941. The Company filed no partnership return for that year (R-124). For the calendar years 1942 and 1943, the Company filed partnership returns, and Petitioner and his wife each filed separate Federal Income Tax Returns in which each reported one-half of the net income of the Company for each of those years, respectively (R-125, 126).

I. The Books of Account of The Company.

The profit and loss account of the Company showed a net balance of $18,795.19 as of December 31, 1941, all of which was credited to Petitioner as of that date (R-124). No drawing or capital account for Petitioner's wife was carried on the books of account of the Company during that year (R-124). Effective as of January 1, 1942, an entry was made in the books of account of the Company transferring one-half of the capital of that Company, amounting to $12,633.20, from Petitioner's account to that of his wife (R-125). The profit and loss account of the Company for the year 1942, showed a net balance of $84,741.70 of which one-half was transferred to Petitioner's account and one-half to the account of Petitioner's wife. *Respondent's Exhibit B* (*Reserve Side*) (*R-66*).

Only negligible amounts were ever withdrawn from the Company, and all of the Company's income was allowed to accumulate to finance the expanded operations (R-126).

IV.

SPECIFICATION OF ERRORS RELIED UPON

The Court of Appeals erred in the following respects:

1. In affirming the decision of the Tax Court.

2. In sustaining the ultimate conclusions drawn by the Tax Court from its findings of evidentiary facts, based on evidence which was not in conflict, without making an independent determination of the correctness of those ultimate conclusions.

3. In failing to hold that the ultimate conclusions set forth in Question II under the caption "This Petition Presents Four Questions" in the Petition in support of which this Brief is filed were questions of law, or mixed questions of law and fact, the correctness of which the Court of Appeals was required to determine independently of and without reliance for support on the Decision of the Tax Court.

4. In holding that the ultimate conclusions drawn by the Tax Court from its findings of evidentiary facts, based on evidence which was not in conflict, were supported by substantial evidence and were not clearly erroneous.

5. In holding that the Company was not, during the taxable years 1942 and 1943, a valid partnership between Petitioner and his wife, Edna Denison, recognizable as such under *Section 181 and 182 of the Internal Revenue Code* and the net income of which was taxable one-half to Petitioner and one-half to his said wife.

V.

SUMMARY OF ARGUMENT

Petitioner contends the judgment or order of the Court of Appeals is erroneous for the following reasons:

1. The Court below misconceived the scope and intensity of the review which it was required to make of the ultimate conclusions of the Tax Court under *5 U.S.C. § 1009* and *26 U.S.C. § 1141 (a)*. It failed to differentiate as it was required to, under those statutory provisions, between basic evidentiary facts as found by the Tax Court and the ultimate conclusions which the Tax Court drew from those evidentiary facts. Since there was no conflict in the evidence the Court below was both permitted, and required,. independently, and without reliance for support on the decision of the Tax Court, to evaluate the correctness of these ultimate conclusions. Nothing less would have satisfied the function of the Court below as a reviewing court under the statutory provisions above referred to. Since it went no further than to determine that those ultimate findings were supported by substantial evidence and were not clearly erroneous, it failed to discharge the full measure of its duty.

2. Had the Court below properly performed its function as a reviewing court and had it evaluated the Tax Court's ultimate conclusions to determine their correctness, it would have found those conclusions erroneous, as did Judge McAllister in his dissenting opinion.

3. The ultimate conclusions drawn by the Tax Court from the evidentiary facts which it found to exist were, in any event, unsupported by substantial evidence and were clearly erroneous because those ultimate conclusions were contrary to the great weight of the evidence.

4. The Court below erroneously determined that the Company was not a valid partnership between Petitioner and his wife for Federal Income Tax purposes, the net income of which was taxable one-half to Petitioner and one-half to his wife, contrary to this Court's decision in *Culbertson* v. *Commissioner,* 337 U.S. 733.

VI.

REFERENCE TO STATUTORY PROVISIONS

During the course of this Brief, reference is made to the following statutory provisions: *Sections 181 and 182 of the Internal Revenue Code; Section 1009, Title 5 U.S.C., and Section 1141 (a) of Title 26 U.S.C.*, all of which are set forth in full in Appendix A to this Brief.

VII.

ARGUMENT

A. The Court below failed to perform the duty cast upon it as reviewing court under 26 U.S.C. §1141 (a) and under 5 U.S.C. § 1009.

The jurisdiction of the Court below to review the decision of the Tax Court in the instant case is prescribed by *Section 1141 (a) of Title 26 U.S.C.* which provides as follows:

> "The courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of title 28 of the United States Code,*in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury;* and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of title 28 of the United States Code." (Italics supplied.)

The review by the Court of Appeals should have been of the same scope and intensity as if it had had under consideration a decision of a District Court in a civil action tried without a jury. Rule 52(a) of the Federal Rules of Civil Procedure defines the scope and intensity of that review, at least in negative terms, in the following language:

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the Trial Court to judge the credibility of witnesses."

The intent of Rule 52(a) is to assimilate the scope and intensity of appellate review of decisions in all non-jury cases, whether the issues are legal or equitable, to the scope and intensity of such review under the former well-understood equity practice. *Cyclopedia of Federal Procedure, 2nd Ed. Vol. 12, § 6211.*

Judge Sanborn accurately states the equity rule in *Aetna Life Insurance* v. *Kepler,* 116 Fed. (2nd) 1, 5 (C.C.A. 8th) as follows:

> "The effect of Rule 52(a) was to establish a uniform standard for testing the validity of findings of fact in any case tried without a jury. The standard adopted was that which had always prevailed in equity.
>
> "This Court with respect to jury-waived cases, is no longer merely a court of error which considers only questions of law. It now acts as a court of review in all non-jury cases in accordance with the practice which formerly prevailed in equity appeals.
>
> "The findings of fact of the court below to the extent that they are unsupported by substantial evidence, or are clearly against the weight of the evidence, or were induced by an erroneous view of the law, are not binding upon this Court."

See also *United States* v. *Still,* 120 Fed. (2nd) 876 (C.C.A. 4th), cert. denied 314 U.S. 671. It is thus clear that even though a finding of fact is supported by substantial evidence it is nevertheless clearly erroneous if it is contrary to the great weight of the evidence.

The quality of conclusiveness which attaches to findings of fact when supported by substantial evidence and

not clearly erroneous is a quality possessed only by findings as to basic evidentiary facts. It does not, in a case like the one under consideration, where there is no conflict in the evidence, extend to ultimate conclusions drawn from such findings as to basic evidentiary facts. This distinction is well stated in *Kuhn* v. *Princess Lida of Thurn & Taxis,* 119 Fed. (2nd) 705, 706 (C.C.A. 3rd), where the Court had under review a decision of the United States District Court. In the course of its opinion the Court said:

> "The appellee reminds us that we are not at liberty to disturb findings of fact made by the trial court unless they are unsupported by evidence or are otherwise clearly erroneous. Rule 52(a), 28 U.S.C.A. following section 723c. The reason for the rule rests in large part upon the fact that the trial judge who hears the witnesses testify and observes their demeanor upon the stand is better qualified to appraise the credibility of their testimony and to resolve the conflicts therein. So long, therefore, as a finding of fact is supported by evidence and is not clearly erroneous, it is to be accepted on appeal as a verity.
>
> "The rule does not operate, however, to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings. And so, while accepting the facts competently found by the trial court as correct, an appellate court remains free to draw the ultimate inferences and conclusions which, in its opinion, the findings reasonably induce. Such was the law prior to the promulgation of the Rules of Civil Procedure. * * *. The new Rules have worked no change in this regard, or with respect to the ultimate conclusions in jury-waived cases in particular. * * *. The sufficiency

> of the evidence to sustain a trial court's conclusion or finding of an ultimate fact remains appropriate matter for an appellate court's consideration. * * *. Where the evidentiary facts are not in conflict or dispute, the conclusions to be drawn therefrom are for the appellate court upon review of the trial court's action. * * *. An incorrect conclusion by a trial court qualifies as a 'clearly erroneous' finding, for the correction whereof on appeal Rule 52(a) specifically provides."

See also *Murray* v. *Noblesville Land Company*, 131 Fed. (2nd) 470, cert. denied 318 U.S. 755; *Commissioner of Internal Revenue* v. *Fiske's Estate*, 128 Fed. (2nd) 487, cert. denied 317 U.S. 635.

It is precisely the distinction pointed out in the *Kuhn* case, which, for some reason, Judges Martin and Allen failed to make in the instant case. The failure to make that distinction is difficult to understand since the Court below has only recently made that distinction in *Lincoln Electric Company* v. *Commissioner*, 162 Fed. (2nd) 379 (C.C.A. 6th), and in *Lawton* v. *Commissioner*, 164 Fed. (2nd) 380 (C.C.A. 6th), where the Court relied on *5 U.S.C. § 1009* as the basis for that distinction and where it reversed the decisions of the Tax Court there under review. More recently the Court below made the same distinction in a case involving the validity of a husband and wife partnership in which it overruled a decision of the Tax Court holding the partnership invalid. *Weizer* v. *Commissioner*, 165 Fed. (2nd) 772 (C.C.A. 6th). In the *Weizer* case, also, the distinction appears to have been based on *5 U.S.C. § 1009*. Still more recently the Court below made the same distinction but based the distinction on the pro-

visions of *26 U.S.C. § 1141(a)*. See *Wright-Bernet* v. *Commissioner of Internal Revenue*, 172 Fed. (2nd) 343 (C.C.A. 6th).

The Court of Appeals for the Sixth Circuit is not alone in holding that the ultimate conclusions drawn from evidentiary findings based on evidence as to which there is no conflict are not binding on the Court of Appeals when it reviews the decision of the Tax Court involving the issue of the validity of a family partnership. See *Wenig* v. *Commissioner*, 177 Fed. (2nd) 65 (C.C.A. D.C.) and *Graber* v. *Commissioner*, 171 Fed. (2nd) 32 (C.C.A. 10th). With respect to those ultimate conclusions, those cases make it clear that the Court's evaluation is not limited to determining whether they are supported by substantial evidence and not clearly erroneous. There is not even a shred of dispute as to the evidentiary facts in the instant case. The evidence was not conflicting, and there is not even the faintest suggestion in the Findings of the Tax Court that the credibility of any of the witnesses is to be doubted. With respect to those evidentiary findings, the majority of the Court below perhaps sufficiently discharged its appellate functions when it concluded that there was substantial evidence to support them and that they were not clearly erroneous. It did not sufficiently discharge those functions when on the same ground it disposed of the ultimate conclusions of the Tax Court which are pivotal in the decision in this case.

Had this case been presented to the Court below before *26 U.S.C. §1141(a), as amended,* and *5 U.S.C. §1009* altered the rule announced in this Court's decision in *Dobson v. Commissioner,* 321 U.S. 231, the approach of

that Court to the ultimate conclusions of the Tax Court would have been permissible. See *Commissioner* v. *Tower*, 327 U.S. 280, and *Lusthaus* v. *Commissioner*, 327 U.S. 293. It in any event ceased to be allowable when *26 U.S.C. § 1141(a)* was amended so as to place decisions of the Tax Court and those of Federal District Courts on the same footing for purposes of appellate review. With respect to the ultimate conclusions drawn from findings of evidentiary facts, at least where there is no conflict in the evidence, the Court of Appeals must be satisfied as a matter of the exercise of its independent judgment that these ultimate conclusions are correct. This is true, at least, where those ultimate conclusions involve the issue of the validity of a family partnership. In such case the ultimate conclusions are to be regarded as questions of law, *Lawton* v. *Commissioner*, 164 Fed. (2nd) 380, 383 C.C.A. 6th); *Weizer* v. *Commissioner*, 165 Fed. (2nd) 772, 775 (C.C.A. 6th), or mixed questions of law and fact. *Graber* v. *Commissioner*, 171 Fed. (2nd) 32 (C.C.A. 10th); *Wenig* v. *Commissioner*, 177 Fed. (2nd) 65 (C.C.A. D.C.); *cf. United States* v. *Gypsum Company*, 333 U.S. 364, 395, where a finding that "the evidence fails to establish that defendants associated themselves in a plan to blanket the industry under patent licenses and stabilize prices" was regarded as a mixed question of law and fact and not conclusive even though the evidence on which it was based was conflicting and even though it was supported by substantial evidence. This Court held that it was permissible to treat such a finding as "clearly erroneous" if the reviewing Court on the entire evidence is left with the firm conviction that a mistake had been committed.

Petitioner's rights were accorded something less than the full protection which our judicial system intended that they should have when the majority of the Court below used, to determine the sustainability of the Tax Court's ultimate conclusions, the same divining rod which it was permitted to use, and permitted to use only, to detect error in the basic evidentiary findings.

Not without considerable reluctance do we feel it necessary to call this Court's attention to a fact which we discovered only after this Brief had been written and had been placed in the hands of the printer for final printing. That fact is that at the time the Court below was considering this case, and at the time it reached its decision, it did not have before it in any form the Exhibits which were introduced by either Petitioner or Respondent at the trial of this case in the Tax Court. Those Exhibits were not printed as part of the record, but pursuant to an order entered by the Court below (R-135) *were directed to be transmitted to it by the Tax Court in their original form. That order provided for the transmission of those Exhibits to the Court below upon its direction. For reasons which are not now apparent the Court below never issued that direction, and, as a result the Exhibits were not transmitted by the Tax Court in accordance with that order. When we applied to the Court below to transmit those Exhibits to this Court, we learned for the first time that the Tax Court had never transmitted those Exhibits to the Court below. In order to accomplish their transmission to this Court, we were compelled to apply to the Tax Court to transmit them to the Court below so that it in turn could transmit them to this Court.*

We do not assume to say that if the Court below had had those Exhibits before it while it was considering, and when it reached, its decision in this case, the result would have been otherwise. We do suggest, however, that the circumstance that the Court below did not have those Exhibits before it in any form casts doubt on the correctness of a judicial decision which the Court rendering that decision stated to have been reached upon a consideration of the "whole record," and which, in fact, was rendered by that Court when something less than the "whole record" was before it.

B. Had the Court below evaluated the ultimate conclusions of the Tax Court as a matter of independent judgment to determine their correctness, it would have been required to reach the conclusion that those ultimate conclusions were erroneous.

We are, of course, cognizant of the fact that under this Court's decision in the *Culbertson* case, the validity of each family partnership turns on the factual background involved and that consequently decisions in other cases involving the same issue are of lesser importance than where different questions are presented. There is, however, such a close coincidence between the facts of this case and the cases to which we will refer below that we feel justified in urging that they should be treated as controlling in this case. We have set forth at length in Appendix B of this Brief the facts of those cases so that the Court may see the virtual identify existing between the fact situation in each of those cases and the fact situation in this case.

We have not been able to understand in what respects the Court below regarded this case as differing from *Wei-*

zer v. *Commissioner,* 165 Fed (2nd) 772 (C.C.A. 6th), the facts of which are set forth in Appendix B of this Brief. Though the majority of the Court below stated that the two cases differed in "material aspects," it was never more specific with respect to the differences. We are encouraged to persist in our inability to understand those differences by the dissenting opinion of Judge McAllister, who experienced the same difficulty which we do. The Court below held in the *Weizer* case that the Tax Court's ultimate conclusions involved questions of law and were erroneous. Accordingly, it held that William Weizer & Co. was a valid partnership and reversed the decision of the Tax Court. Such factual differences as do exist between this case and the *Weizer* case do not seem to us to be such as to produce a difference in result. Mrs. Weizer rendered services over a longer period of time than Mrs. Denison and was rendering them on a full-time basis during the taxable year in question. The period of time during which the services were rendered, and the fact that they were part-time during the taxable year, would not seem to be important, under the criteria announced by this Court in the *Culbertson* case. See *Wenig* v. *Commissioner, infra,* and *Johnston v. Commissioner, infra.* While it is questionable whether Mrs. Weizer's services were more valuable than Mrs. Denison's, which the Tax Court conceded were valuable in 1940 and 1941 (R-129), that difference would clearly not sustain a difference in result under those criteria. Funds of the disputed partnership in the *Weizer* case were used to buy real property and securities held in the wife's name, while the same is not true in the instant case. That distinction might conceivably be of some importance, except for the fact that the Tax Court found in the instant case that only a negligible amount of the

income of the Company was ever distributed to Petitioner and his wife and that it was allowed to accumulate to finance expanded operations.

We direct this Court's particular attention to *Johnston* v. *Commissioner,* 180 Fed. (2nd) 355 (C.C.A. 6th) in which the Court of Appeals for the Sixth Circuit in a per curiam decision rendered only three days prior to that in the instant case by Judges Simons, Miller (who did not sit in the instant case) and Martin (who did) reversed the decision of the Tax Court, *8 T.C.M. 198,* on the basis of its decision in the *Weizer* case. In the course of its opinion, it noted that the Tax Court did not refer in its opinion to the *Weizer* case (which is true in the instant case) and that the Tax Court's decision was rendered before this Court's decision in the *Culbertson* case (which is also true in the instant case). We urge this Court to compare the facts of that case, which are set forth in Appendix B to this Brief, with those of the instant case. Those facts are fully set forth in the Tax Court's decision *8 T.C.M. 198.* We cannot, and feel certain that this Court cannot, after reading the facts of the *Johnston* case, square the result reached in that case with the result which the Court below reached in this.

Supporting as strongly, if not more so, than the *Weizer* and *Johnston* cases, our position that the ultimate conclusions of the Tax Court are erroneous, is the decision of the Court of Appeals for the District of Columbia in *Wenig* v. *Commissioner,* 177 Fed. (2nd) 61 (C.C.A. D.C.), in which the Court of Appeals sustained the validity of a husband and wife partnership and reversed the Tax Court's decision, *6 T.C.M. 1340,* to the contrary. The facts of the *Wenig* case are set forth in Appendix B to this brief.

The Court of Appeals held, in reversing the Tax Court, and in the exercise of its own independent judgment, that the ultimate conclusions of the Tax Court were erroneous. *177 Fed. (2nd) 62, 65.* The decision of the Court of Appeals in the *Wenig* case is of particular significance because it was decided on July 18, 1949, which was subsequent to this Court's decision in the *Culbertson* case, which is referred to in the *Wenig* case. In addition, it should be noted that the ultimate conclusions of the Tax Court in the *Wenig* case were almost identical with those of the Tax Court in the instant case, and the evidentiary facts in that case more strongly supported the ultimate conclusions of the Tax Court than do the evidentiary findings in the instant case. In the first place the failure of the challenged partnership in the *Wenig* case to observe the formalities indicating a partnership extended over a longer period of time than in the instant case. In the second place, the evidence of capital contribution by the wife is much less persuasive than in the instant case, particularly since the last moneys advanced by Mrs. Wenig antedated the taxable years in question by almost 10 years. Mrs. Wenig rendered no services to the partnership during the taxable years in question, never at any time rendered full time services to the disputed partnership, rendered no regular services to that partnership for more than 10 years prior to the taxable years in question, and rendered no valuable services, even in the form of making valuable suggestions with respect to the conduct of the business of the partnership, for more than 3 years prior to the taxable years in question.

See also *Singletary* v. *Commissioner, 155 Fed. (2nd) (C.C.A. 5th)* the facts of which are set forth in Appendix B to this brief.

In appraising the correctness of the ultimate conclusions of the Tax Court in this case, it should be noted first that Judge Hill's decision was not reviewed by the Tax Court. Secondly it should be noted that Judge Hill's decision was promulgated on *October 25, 1948*. The *Culbertson* case was not decided until *June 27, 1949*. White it is true that Judge Hill answered the ultimate question which must be answered under the doctrine of that case, he did so in a climate of judicial opinion which regarded the objective tests of "vital services" and "original capital" as touchstones of adjudication rather than as tokens of intent. The decisions of the Tax Court which Judge Hill cites were replete wtih reference to the "vital services" and "original capital" test. It is generally conceded that the trend of Tax Court decisions on the subject of family partnerships has been much more favorable to taxpayers since the *Culbertson* case than it was before. Particularly has it been characterized by a strongly marked tendency to sustain as valid husband and wife partnerships where, as in the instant case, the wife urged the undertaking of the enterprise, was associated with, and rendered uncompensated services to, the enterprise from its very inception and made available to the enterprise capital originating with her which was used in the conduct of the business of that enterprise. With unvaried uniformity the Tax Court's decisions have been favorable to taxpayers in cases of that kind and which involve fact situations not materially different from that in the instant case, and in many instances less strongly supporting a finding of a bona fide intent to conduct business as partners than the facts established by the record in the instant case. See *Delchamps* v. *Commissioner*, 13 T.C. 281; *Estate of Frederick A. Depue* v. *Commis-*

sioner, 13 T.C. 462; *Theurkauf* v. *Commissioner,* 13 T.C. 529; *Kiyono* v. *Commissioner,* 8 T.C.M. 935. We invite the Court's particular attention to two very recent cases which clearly point, we think, to the conclusion that were the instant case presented to the Tax Court for its decision today, Petitioner would have prevailed. *Matuszewski* v. *Commissioner,* 13 T.C. 738 and *Milenz* v. *Commissioner,* 9 T.C.M. 22.

To allow the decision of the Court below to stand is to make Petitioner the victim of an accident of time and to allow his rights for not only the taxable years involved in this case, but for future years as well, to be determined by a decision of the Tax Court rendered in a judicial climate which no longer prevails in that Court and in the face of a failure on the part of the Court of Appeals properly to perform its functions as a reviewing court under *26 U.S.C. § 1141 (a).*

Finally we invite this Court's attention to the decision of the District Court for the Northern District of New York in *Walsh* v. *Shaughnessy,* 77 Fed. Supp. 577 (D.C. N.D. N.Y.) sustaining the validity of a husband and wife partnership on a set of facts which closely parallel those in the case at bar in all important respects. The facts of that case are set forth in Appendix B to this Brief.

C. The ultimate conclusions of the Tax Court on which the decision of the Court below is based are contrary to the great weight of the evidence.

1. The great weight of the evidence will sustain no other conclusion than that Petitioner and his wife intended in good faith to conduct the business of the J. P. Denison Company as equal copartners.

Since a Court cannot look into the minds of humans to determine their intent, it must deduce that intent from a factual mosaic pieced together from their words and actions. The pattern formed by that mosaic is almost never completely symmetrical, and there are usually some of the components which mar the consistency of its basic design. In this case the more important factual components which form the basic design are simple and uniform. The salient evidentiary facts as found by the Tax Court from the undisputed evidence all point irresistibly to the conclusion that Petitioner and his wife intended in good faith to conduct the business of the Company as copartners and are set forth in the paragraphs which follow.

Petitioner's wife, not Petitioner, conceived the idea of the Company. Her idea was not that Petitioner should engage in that business alone, but rather, as the Tax Court found, that "they (i.e. she and he together) go into the business of manufacturer's agent in Detroit" (R-119). Petitioner at first opposed the idea on the ground that it was not feasible and finally embraced the idea only after his wife, acting on her own initiative, convinced Petitioner that it was practical. What convinced Petitioner that his wife's idea was feasible were the assurances of Messrs.

Matley and Peters, purchasing agents for substantial concerns, that they would place orders with the enterprise upon which Petitioner and his wife were about to embark *together*. In this connection, it should be noted that the Tax Court expressly found that Petitioner and his wife told Messrs. Matley and Peters that they "were considering entering the business of manufacturers' agent *together*" (R-120). Petitioner then contacted various concerns who manufactured supplies and satisfied himself that arrangements could be made to represent these concerns as manufacturers' agent. Though the Tax Court made no express finding to that effect, the undisputed evidence is that those concerns were told precisely what Messrs. Matley and Peters were told, namely, that Petitioner and his wife were going into business *together* (R-93).

After Petitioner's initial reluctance had been overcome, and he was satisfied that his wife's idea was feasible, it was necessary that a place of business be provided to carry on the business of the venture and that it be provided at minimum expense. The Tax Court found that not Petitioner alone, but that Petitioner and his wife *together*, made the arrangements for the necessary facilities. Those facilities were obtained in consideration of Mrs. Denison's services to Mr. Schroeder which were to be rendered contemporaneously with those which she was to render to the Company. Shortly thereafter the Company commenced business. Before it did, however, Petitioner and his wife on August 3, 1940, executed a formal partnership agreement pursuant to which they agreed to become copartners and to conduct business under the name of the J. P. Denison Company for a period of 10 years, commencing Sep-

tember 2, 1940. The Partnership Agreement provided for equal capital contributions by Petitioner and Mrs. Denison. It stated the purposes of the partnership in general terms, but in such a manner as to include the business of manufacturers' agent, for it authorized the partnership "to buy, sell, trade (and) exchange tools, machinery, mechanical devices, goods, wares and any and all other personal property" (*Paragraph (i) Exhibit 1*) (R-20).

It was not Petitioner, but as the Tax Court found, Petitioner and his wife *together*, who instructed the draftsman to prepare that Agreement (R-120). *Together* Petitioner and his wife went to the office of that draftsman, and *together* they executed it. As bearing on the question of intent of Petitioner and his wife with respect to the business of the Company, two findings of the Tax Court should be noted. The first is that the execution of a Partnership Agreement was prompted by the advice of friends that such an agreement should be executed if Petitioner and his wife "were going into business *together*" (R-120). The second is that Petitioner regarded the Partnership Agreement as a license "necessary for going into business *with his wife*" (R-120).

From the time when the Company began to do business in August of 1940, Petitioner's wife rendered services to that Company for which she never received compensation. During the balance of 1940, Mrs. Denison rendered those services, which were clerical in character, on a full-time basis and was, as the Tax Court found, "the sole representative of the J. P. Denison Company in Detroit" (R-121). During that period, Petitioner continued in the

employ of Universal Cooler Corporation and rendered services to the Company only on week-ends. The Tax Court found that the Company consummated no sales as manufacturers' agent during 1940 and that its receipts in that year were negligible. However, during this period the groundwork was laid for the successful business entity which the Company ultimately became (R-121). Its business did not then require any capital, and the bank account used by the Company in 1940 was the joint personal bank account of Petitioner and his wife on which either was authorized to draw checks.

Certainly if one selects December 31, 1940, as the vantage point to appraise the intention of Petitioner and his wife with respect to the Company, it would be impossible to reach any other conclusion than that Petitioner and his wife intended to conduct the business of the Company as partners. It had no formal books of account, but none were needed in view of the meager volume of its business. No Partnership Income Tax Return was filed by the Company for 1940. Such failure is not difficult to understand in view of the negligible amount of business which that Company did in 1940 and the fact that neither Petitioner nor his wife filed individual Income Tax Returns for that year. It is thus clear that the Tax Court's ultimate conclusion that neither Petitioner nor his wife intended to conduct the business of the J. P. Denison Company as a bona fide working partnership *at any time* (R-126) is manifestly contrary to the weight of the evidence and clearly erroneous.

Manifestations of Intent Subsequent to 1940

Commencing on January 1, 1941, Petitioner devoted his entire time to the business of the Company. His services consisted of the outside work of contacting customers and suppliers. Mrs. Denison also continued all during 1941 to render services to the Company on a full time basis for which she never received compensation. She did all of the inside clerical work. Until September of 1941 the operation of the Company required a negligible amount of capital and fixed assets since it sold products of suppliers which it represented on a straight commission basis. In September of 1941 the manner in which the Company conducted its business changed, and it became necessary that it obtain additional capital or face the loss of its principal accounts. The only capital which either Petitioner or his wife had, which was not already employed in the business of the Company and which could be readily converted into cash, was securities, which each owned individually. Petitioner sold the securities registered in his individual name for $350, and he made the proceeds available to the Company. Mrs. Denison also owned some securities which were registered in her maiden name, Edna MacIntyre, and which the Tax Court found were purchased with her premarital earnings (R-123). These certificates were endorsed by Petitioner's wife and turned over to him with the understanding that they were to be sold and that the proceeds were to be used in the business of the Company. Petitioner sold these securities for $1350 and deposited the proceeds in the bank account of the Company, on which either he or his wife could draw checks. Thereafter those

proceeds were used in the business of the Company and were never withdrawn by, or returned to, Mrs. Denison. Commencing with the date on which the proceeds of the sale of Mrs. Denison's securities were made available to the Company, capital became, and continued to remain, as the Tax Court found, a vital income producing factor in the business of that Company (R-126).

If one selects December 31, 1941 to appraise the intention of Mr. and Mrs. Denison with respect to their relationship *inter sese* in connection with the Company and reviews what they said and did from the beginning, one finds some slight evidence which might be regarded as impugning their intention to conduct the business of that Company as copartners. That evidence may be summarized as follows:

1. During 1941 Petitioner filed with governmental authorities in the State of Michigan two Assumed Name Certificates, one in the name of the Company and one in the name of Bangor Products Company, in which he listed himself as the sole owner of the businesses to which they related.

2. In 1941, also, the Company opened a bank account the signature card covering which indicated that the Company was a sole proprietorship and that Petitioner was the sole proprietor.

We submit that the above evidentiary facts are not substantial evidence, when taken in connection with the other evidentiary facts of this case, to support a finding that Petitioner and his wife did not intend to conduct business of the Company as copartners. In the alternative, we submit

that if such evidentiary facts coupled with the fact that all of the 1941 income of the Company was reported on Petitioner's individual income tax return constitute substantial evidence to support an ultimate finding of lack of the required intent, the great weight of the other evidence will admit of no other conclusion than that Petitioner and his wife did intend from the time the Company commenced doing business in 1940 and continuing all during the years 1942 and 1943, to conduct that business as copartners.

In attempting to evaluate the weight to be given to the evidentiary facts set forth in the preceding paragraph, it is important to inquire as to the background and training of Petitioner and his wife. Neither Petitioner nor his wife, at the time the Company was founded, had ever been charged with the responsibility of running a business either large or small. Petitioner was only 32 and had during his entire working life been a part of that group of employees who merely execute the *minutiae* of business policy laid down by others. Petitioner's wife was 33, and her business training consisted of working as a general clerk prior to her marriage some 10 years before. Petitioner's wife was a high school graduate, but Petitioner's education ended after 2 years of high school. Neither Petitioner nor his wife had any knowledge of bookkeeping. The books of account of the J. P. Denison Company were kept by a part-time girl who received only $50 per month for her services.

Viewed against the background of Petitioner and his wife, the activities of Petitioner's wife in connection with the founding of the Company and in the subsequent operations of its business, and the fact that she made capital

originating with her available to it, and that Petitioner and his wife executed a formal partnership agreement, rob the evidentiary facts on which the Tax Court relied of whatever substantiality they might otherwise have had. In this connection the language used by the District Court for the Northern District of New York in *Walsh* v. *Schaughnessy,* 77 Fed. Supp. 577, the facts of which are set forth in Appendix B to this Brief, is particularly worthy of note. The Court there sustained a challenged husband and wife partnership as valid, notwithstanding "formal manifestations" of a contrary intent more numerous and extending over a much longer period of time than those in the instant case, saying during the course of its opinion:

> "We would be somewhat less than realistic if we failed to recognize that business transacted between husband and wife has its basis in mutual trust rather than in legal forms. The legal effect of writings was not a consideration between these two parties. They transacted their business in the same manner; each performed the same duties, and the finances of the business received the same treatment both before and after such papers came into existence. The Court refuses to believe that the writings above referred to constituted a repudiation of a relationship which had existed over a period of years. The intention of the parties once found to exist and continuously manifested by courses of conduct will not be deemed abandoned by the occasional contradictory writings without evidence that the legal import of the writings was appreciated and acted upon. The evidence in this case contradicts any such understanding or action."

The holding of the Court in the *Walsh* case, the holding of the Court below in *Weizer* v. *Commissioner,* 165 Fed.

(2nd) 772 (C.C.A. 6th) and in *Johnston* v. *Commissioner,* 180 Fed. (2nd) 355 (C.C.A. 6th), and the holding of the Court of Appeals in *Wenig* v. *Commissioner,* 177 Fed. (2nd) 32 (C.C.A. D.C.), the facts of each of which are set forth at length in Appendix B to this Brief, make it indisputably clear that the evidentiary facts mentioned above even when coupled with the income tax return filed by Petitioner for 1941 are not substantial evidence to sustain a finding of the absence of the required intent on the part of Petitioner and his wife to conduct business as partners. In the alternative those cases all indicate that such a finding is contrary to the great weight of the evidence.

Finally the following should be noted in appraising the evidentiary facts relied upon by the Tax Court in reaching its ultimate conclusions:

> 1. The Assumed Name Certificates were signed by Petitioner alone. There is no evidence that Petitioner's wife even knew that they were filed, and such certificates can therefore have no evidentiary value as to her intent. The fact that the Assumed Name Certificates were filed in Petitioner's name alone might be accounted for by the fact that, at the time these certificates were filed, public authorities in the State of Michigan refused to accept Assumed Name Certificates covering a husband and wife partnership because of the doubt which they entertained (and which was not removed until January 10, 1942, which was long after both of the certificates in question were filed) as to whether such a certificate could be filed. See *Anderson* v. *Commissioner,* 6 T.C. 956. It is clear that, insofar as the Assumed Name Certificate covering the name "Ban-

gor Products Company" is concerned, the only purpose of the certificate was to preempt the name to which it related to preserve continuity of relations with existing customers, and it cannot reasonably be relied upon as indicating the intent of Petitioner with respect to his business relationship with his wife.

2. More important than the fine print on the bank signature card is the fact that both Petitioner and his wife signed it and either could draw on the account to which it related. The fact that either could drawn on the account more realistically indicates what the parties conceived their relationship to each other to be in respect of the Company than the printing on the signature card, which, in all probability, neither Petitioner nor his wife ever read.

Manifestations of Intent Subsequent to 1941

During the taxable years in question, namely 1942 and 1943, Mrs. Denison continued to render service to the Company, but only on a part-time basis. Petitioner continued to devote his full time to the affairs of the Company though he was aided by 3 salesmen.

The Company filed no Partnership Income Tax Return for 1941, and Mrs. Denison filed no individual Income Tax Return for that year. Petitioner in March of 1942 filed an Individual Income Tax Return for 1941 in which he reported the entire income of the Company and in which he claimed a loss on the sale of the securities which Mrs.

Denison had purchased with her premarital earnings and which she turned over to him to sell to obtain cash for use in the business of the Company. The books of account continued to indicate that the Company was a sole proprietorship and that Petitioner was the sole proprietor until December 31, 1942, at which time appropriate entries effective as of January 1, 1942, were made in those books of account indicating that the Company was a partnership and that Petitioner and his wife were equal partners therein (R-125). All during 1943 the books of account of the Company were kept so as to reflect the status of Petitioner and his wife as equal partners therein.

For both 1942 and 1943 the J. P. Denison Company filed appropriate partnership returns showing half of its income to be distributable to Petitioner and half to his wife. For both of those years Petitioner and his wife each filed separate individual returns in which each reported, and paid a tax on, one-half of the income of the Company.

If one selects as his vantage point December 31, 1943, to appraise the intention of Petitioner and his wife with respect to the Company, one finds as the only evidentiary facts which are inconsistent with an intention on their part to conduct the business of that Company as a partnership, the following: (1) the assumed name certificates which Petitioner filed with respect to the name "Bangor Products Company" and "J. P. Denison Company," (2) the signature card covering the bank account of the J. P. Denison Company, (3) the fact that for one, and one only, of the three years during which the Company kept books of account, those books of account indicated it was not a partnership, and (4) the fact that for one year, and one

year only, in respect of which the Company, and Petitioner and his wife, were required to file Federal Income Tax Returns, those returns indicated that that Company was not a partnership. All of the other evidentiary facts are consistent with, and consistent only with, an intention on the part of Petitioner and his wife to conduct the business of the Company as a partnership in which they were equal copartners.

The evidentiary facts in *Walsh* v. *Shaughnessy, supra,* were much more strongly inconsistent with the intention of the husband and wife to conduct business as copartners, for the formal deficiencies continued to exist over a period of 15 years. Yet the Court held that a valid partnership existed. The same is true of the evidentiary facts in *Weizer* v. *Commissioner,* 165 Fed. (2nd) 772 (C.C.A. 6th), where the formal deficiencies continued from 1915 through 1941. In the *Walsh* case the husband and wife never executed a formal partnership agreement at any time, and in the *Weizer* case such an agreement was not executed until subsequent to the taxable year in question. In *Johnston* v. *Commissioner,* 180 Fed. (2nd) 355 (C.C.A. 6th) formal deficiencies more numerous and significant than those in the instant case continued to exist from 1937 until the middle of 1944 or for two years and one-half after the beginning of the first taxable year for which the Court below held the disputed partnership valid. In *Wenig* v. *Commissioner,* 177 Fed. (2nd) 62 (C.C.A. D.C.) the formal deficiencies were also more numerous and significant than those in the instant case and continued to exist from 1927 until February 1, 1941, a period which included all of the taxable years in question.

2. The great weight of the evidence will sustain no other conclusion than that the services of Edna Denison to the J. P. Denison Company were the contribution of a partner.

The record in the instant case leaves no doubt that Petitioner's wife rendered services to the Company on a full time basis during 1940 and 1941 and on a part time basis thereafter. Even the Tax Court admitted that those services were valuable in 1940 and 1941 and suggest a partner's status (R-129). We think that those services not only suggest, but compel, the conclusion that they were rendered as a partner. The Tax Court found the genesis of the Company was Mrs. Denison's idea that she and Petitioner engage in business *together* as manufacturers' agents. Those services were rendered to an enterprise so conceived and immediately following its conception. They were also rendered immediately following the execution of a formal partnership, and they were services for which Petitioner's wife was not compensated. In 1940 and 1941 the services which Petitioner's wife rendered were indispensably necessary, since they were services which were absolutely essential and which the Company was not in a position otherwise to obtain. What is even more important is that those services were rendered (at least during 1940 and 1941) not in the residue of time after Mrs. Denison had fulfilled her duties as a wife and mother. They were during 1940 and 1941 her principal occupation. To render those services she employed a hired substitute to perform the duties which she formerly, and for ten years, discharged as a wife and mother, and in 1941 sent her older children to boarding school. Such a reversal of position cannot be squared with the conception that she was merely

"helping out" and that such services constituted merely loyal assistance rendered by a wife to help her husband "get started in business."

The fact that the services which Petitioner's wife rendered to the Company in 1942 and 1943 were not rendered on a full time basis is of no moment. In 1942 she spent approximately two days a week at the office of the Company, while in 1943 she went to the office only occasionally. By 1942 the business of the Company was firmly established, and absolute necessity for the rendition of those services which existed in prior years no longer existed (R-51). The indispensably important services which Mrs. Denison rendered during 1940 and 1941 gave her a proprietor's right to enjoy the fruits of her earlier efforts. Petitioner himself devoted less time to the business of the Company in 1942 and 1943, for in those years he was assisted by three salesmen who solicited and placed orders (R-76). Petitioner and his wife did in 1942 and 1943 what all proprietors of a successful enterprise do when the struggle for survival is won. They employed others to perform the duties which they themselves discharged in the critical period.

The only evidence which the Tax Court relies on stripping the services of Petitioner's wife to the Company of their character as the services of a partner is the failure of the Company to observe certain formalities which have already been commented upon. That failure is not substantial evidence on which to base a finding that those services were not the services of a partner as *Walsh* v. *Shaughnessy, supra; Weizer* v. *Commissioner, supra;*

Johnston v. *Commissioner, supra;* and *Wenig* v. *Commissioner, supra,* clearly demonstrate. See also *Singletary* v. *Commissioner, supra.* In any event the great weight of the evidence points irresistibly to a conclusion which is directly contrary to the one which the Tax Court drew from the evidentiary facts.

3. The great weight of the evidence will not sustain the conclusion that the monies which Edna Denison made available to the J. P. Denison Company were not a contribution to its capital.

The uncontradicted evidence in this case conclusively demonstrates, and the Tax Court found, that Petitioner's wife made available to the Company the sum of approximately $1,350 in the Fall of 1941, and that the amount which she so made available originated with her (R-123). Edna Denison, prior to her marriage to Petitioner, had accumulated the sum of approximately $1,500 from her own earnings (R-123), which amount she invested in securities which were registered in her maiden name, Edna MacIntyre (R-123). As a result of purchases and sales of securities with that $1,500, Petitioner's wife owned in the Fall of 1941, securities registered in her maiden name which had a cost of approximately $3,100 (R-123). In the Fall of 1941, when the need of the Company was desperate, and when Edna Denison knew it to be desperate, she endorsed the certificates evidencing those securities and turned them over to Petitioner (R-123). These securities were sold, at a loss, for approximately $1,350, and the amount realized was deposited in the bank account of the Company (R-123). The proceeds of those securities

were never returned to Petitioner's wife and were thereafter used in the conduct of the Company's business (R-113).

No contemporaneous written record documents Edna Denison's intent in making available to the Company for its use the securities which she had acquired with her premarital earnings. The Tax Court found that in parting with those securities she did not intend to make a contribution on her own behalf to the capital of the Company and infers that she intended a gift to her husband (R-129). This finding the Tax Court made in disregard of the only direct evidence on this point. That evidence is Edna Denison's uncontradicted testimony that she made the securities in question available to the Company as a contribution on her own behalf to its capital (R-113). Respondent introduced no testimony in this case. In its findings of fact the Tax Court gave full credence to the testimony of both Petitioner and his wife. There is not a single syllable in its findings or in its opinion which even suggests that it had any doubt whatsoever of the complete credibility of the testimony of both Petitioner and his wife. Yet it disregards Mrs. Denison's clear and unequivocal testimony in favor of circumstantial evidence which, for reasons hereinbefore mentioned, is a most unsatisfactory and unreliable guide to intent.

The truth of Mrs. Denison's uncontradicted statement as to her intent and purpose in making her securities available to the Company need not rest alone on her unimpeached veracity. The surrounding facts and circumstances stamp that statement with an authenticity which is impervious to attack by the circumstantial evidence on

which the Tax Court relied. In the first place the funds representing the sale of her securities which Mrs. Denison made available to the Company were placed at its disposal at a time when it desperately needed capital to finance the purchase and sale of products which it had formerly sold on a straight commission basis for Bangor Products Company, in order to avert the loss of two of the Company's principal customers. In the second place, those funds were made available at a time when Mrs. Denison was devoting her full time to the business of the Company. In the third place, the funds were needed by an enterprise which she had conceived, which she had urged that she and her husband undertake *together,* and for the success or failure of which she felt sufficient responsibility to induce her to entrust the care of her three young children to a hired nursemaid and even to separate herself from the two older children by sending them away to school. In the fourth place, it was a venture which she had suggested as a joint enterprise with her husband and which both Schroeder and Messrs. Matley and Peters and also the suppliers whose products the Company sold had been advised was the joint enterprise of Petitioner and his wife. In the fifth place, the enterprise which received the proceeds of the securities of Petitioner's wife was the very enterprise in respect of which she and Petitioner had executed a formal Partnership Agreement.

Lastly and most important, the source of the funds which the Company received should not be forgotten. They were not merely securities which Edna Denison had purchased with her premarital earnings. They were her separate property not only legally but actually. In her thinking they were her *own* in the most individual sense

in which it is possible to use that term. That such was the case is made indisputably clear by the fact that, though Petitioner and his wife had been married for ten years, by the Fall of 1941 all of the securities in question, many of which had been purchased during their married life, were all registered in Edna Denison's maiden name. Those securities represented a fund which Edna Denison had preserved intact through the depression years of the early 1930's and in the face of the inevitable, and always difficult to meet, expenses of the early years of married life and parenthood. It is simply incredible to assume in the face of such a background that she made a gift of those securities to her husband. There must have been times during the ten years of their married life when Petitioner's need for money was as great, or almost so, as was that of the Company during the Fall of 1941. Though Petitioner's wife had kept her premarital property intact for ten years in spite of the financial vicissitudes to which she and her husband must have been subject, the Tax Court infers she was induced to part with her securities as an act of "loyal assistance" to her husband in the Fall of 1941. That supposition simply does not conform with the facts or human experience. The conclusion is irresistible that Mrs. Denison made her securities available to the Company for precisely the purpose which her uncontradicted testimony reveals, namely, as a capital contribution to a business enterprise in which she had a stake as an equal partner with her husband.

There is not a scintilla of evidence in the record that the monies which Mrs. Denison made available to the Company in the Fall of 1941 were intended as a loan, and there is nothing in the record to suggest that they were a

gift save the fact that there is no formal written evidence that they were intended as a capital contribution. In both *Walsh* v. *Shaughnessey, supra, Weizer* v. *Commissioner, supra,* and *Johnston* v. *Commissioner, supra,* the same lack of formal evidence was present, and yet a contrary conclusion was reached by the courts which decided those cases. To the *Walsh, Weizer,* and *Johnston* cases should be added *Wenig* v. *Commissioner,* 177 Fed. (2nd) 62 (C.C.A. D.C.). There, as in the instant case, the Tax Court inferred from the absence of any contemporaneous formal evidence with respect to the intention of a wife in making her own separate funds available to a claimed husband and wife partnership that a gift to her husband was intended. The Court of Appeals for the District of Columbia emphatically rejected the Tax Court's conclusion in this regard and held that a valid partnership existed, saying:

> "When a wife supplies the money with which her husband does business, some strong evidence is necessary to support a conclusion that she was not thereby a participant in the venture. We recall at this important juncture that we are not testing the technicalities of partnership under general commercial law; participation in any sort of joint venture is sufficient status. Assumption, without evidence, that a wife's contribution of money and ideas is merely wifely assistance to her husband as such, however justified a century ago, is outmoded as legitimate rationale."

The Tax Court laid considerable stress on the fact that Petitioner claimed, and was allowed, the loss on Mrs. Denison's securities, the proceeds of which were deposited in the Company's bank account, as substantiating its con-

clusion that the making available by Petitioner's wife of such securities was not intended to be a contribution by her to the capital of the Company. Actually, the fact that a loss was allowed to Petitioner in his 1941 Income Tax Return is at variance with the conclusion of the Tax Court that such transaction constituted a gift by Mrs. Denison to Petitioner. If, as the Tax Court assumes, Mrs. Denison made a gift of her securities to Petitioner, Petitioner was not entitled to the loss which he claimed in his 1941 Income Tax Return, for if Petitioner acquired those securities by way of gift, the basis of those securities for purposes of determining the loss thereon to Petitioner would have been their fair market value at the time of the gift rather than their cost to Petitioner's wife. *See Section 113 (a) (2) of the Revenue Act of 1938.* Since those securities were sold immediately after they were delivered to Petitioner by his wife, it is clear that their value at the time of the gift, which the Tax Court assumes to have been made by Mrs. Denison, must have been substantially identical with the price which was received on their resale. It follows, therefore, if Petitioner received those securities by way of gift, he was not entitled to claim any loss thereon for Federal Income Tax purposes. On the other hand, if in making her securities available to the Company for use in its business Mrs. Denison was making a contribution to the capital of the partnership, the basis for computing gain or loss to that partnership would have been Mrs. Denison's cost. *See Section 113 (a) (13) of the Revenue Act of 1938.* In short, the loss to the partnership on Mrs. Denison's securities would have been precisely the loss claimed with respect to the sale thereof in Petitioner's 1941 Federal Income Tax Return.

In connection with the aforementioned loss, it is first

of all significant that in his 1941 return, the loss on Mrs. Denison's securities was treated as loss resulting from the sale of those securities by the Company. It is even more significant, however, that not only was the loss so claimed allowed but that it was allowed after audit. Petitioner paid additional income taxes for 1941 in the amount of $44.47 and that additional income tax was attributable to the disallowance of a claimed deduction for Federal Excise Taxes and not in any way to any claimed improper treatment of the loss on the sale of Mrs. Denison's securities, which was permitted to stand without change (R-94). The only theory on which Respondent's representatives could have allowed that loss was on the theory that Mrs. Denison's securities found their way into the hands of the Company as a contribution by her to its capital and that the Company was a partnership and Mrs. Denison one of the partners thereof. Had Respondent's representatives applied the Tax Court's theory of a gift, they would have harvested a greater amount of tax. The fact that they did not probably indicates that they realized the Company was a partnership but were satisfied to let the loss stand, since by reporting all of the Company's income in his own return a greater amount of tax was payable than if Petitioner and his wife had, as they were entitled to, each reported one-half of the income of the Company.

D. CONCLUSION

So recently has this Court spoken on the subject of the validity of family partnerships that it would be presumptuous again to ask it to address itself to the same problem, were it not for the fact that it is a matter of paramount importance not only to the Petitioner in this case but to

the Bench and Bar that this Court further clarify its position with respect to this problem. See *"Family Partnership and the Income Tax—the Culbertson Chapter," Paul W. Burton, Volume 98, No. 2, University of Pennsylvania Law Review 143.* The currents and eddies of judicial uncertainty have not subsided as a result of this Court's decision in the *Culbertson* case. They persist and continue to churn the waters in the stream of judicial decision. The number of family partnership cases now pending and still awaiting final decision is legion. Those yet to reach even the initial forum of adjudication are substantial in number. Unless this Court undertakes to demonstrate the application of the criteria for determining the validity of family partnerships which it enunciated in the *Culbertson* case to the facts of a specific case, confusion and uncertainty will continue to exist, and the body of law in the Tax Court, in the District Courts and in the Courts of Appeal dealing with the subject of family partnerships will be a litter of conflicting and irreconcilable decisions which will stand as a lasting reproach to any teleological jurisprudence.

While we think that vital considerations of public policy speak eloquently on behalf of our request that this Court review the instant case, there is another reason, no less compelling, why that request should be granted. Briefly and simply that reason is that this Court, and only this Court, can prevent, by reviewing this case, a most grievous miscarriage of justice. That assertion has its genesis not in the zeal of an advocate seeking appelate review to be able to assure his client that all possible steps have been taken to protect his interest. It stems from the most profound, sincere and deep-seated conviction which legal

counsel ever had that a judgment of a judicial tribunal is erroneous.

We have always believed that one of the outstanding virtues of Anglo-American law is that, under it, persons similarly circumstanced are similarly treated. Our faith that that system continues to have that virtue will be considerably attenuated if not destroyed while the decision of the Court below remains unreversed. We have tried and tried again, but have failed, to reconcile, the result reached by the Court below in this case with the result reached in the *Walsh, Weizer, Johnston* and *Wenig* cases. We ask this Court to read and analyze the facts of those cases (which are set forth *in extenso* in Appendix B to this Brief), and we feel sure that this Court will experience the same difficulty which we experienced, and which Judge McAllister experienced, in squaring the decisions in those cases with the decision of the Court below in this case. Either the *Walsh, Weizer, Johnston* and *Wenig* cases are right, and we believe that they are, and this case is wrong, or the converse is true. There is no middle ground. The result in this case and that in the *Walsh, Weizer, Johnston* and *Wenig* cases cannot be accommodated in a system of jurisprudence the touchstone of which is equality of treatment for all similarly situated. They cannot be so accommodated even under the fluid principle that divergent fact situations warrant divergent results, unless that principle is to be made a mere device to reconcile the irreconcilable. We cannot believe, and will not believe, that such is the case. This Court, and this Court alone, remains the only forum in which the vindication of that faith is still possible.

For the reasons set forth above we respectfully submit that the Writ of Certiorari should be granted as prayed in the Petition.

Respectfully submitted,

EDWARD S. REID, JR.
EMMETT E. EAGAN
Attorneys for Petitioners

Dated: May 31, 1950.

APPENDIX A

5 U.S.C. § 1009(e):

> "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

28 U.S.C. § 1254:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> • • •"

INT. REV. CODE §113(a) (2, 13) (Revenue Act of 1938, as amended):

"(a) Basis (Unadjusted) of Property.—The basis of property shall be the cost of such property; except that—

• • •

"(2) Gifts after December 31, 1920.—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift, except that if such basis (adjusted for the period prior to the date of the gift as provided in subsection (b)) is greater than the fair market value of the property at the time of the gift, then for the purpose of determining loss the basis shall be such fair market value. If the facts necessary to determine the basis in the hands of the donor or the last preceding owner are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis in the hands of such donor or last preceding owner shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner.

• • •

"(13) Partnerships.—If the property was acquired, after February 28, 1913, by a partnership and the basis is not otherwise determined under any other paragraph of this subsection, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to

the transferor upon such transfer under the law applicable to the year in which the transfer was made. If the property was distributed in kind by a partnership to any partner, the basis of such property in the hands of the partner shall be such part of the basis in his hands of his partnership interest as is properly allocable to such property."

INT. REV. CODE § 181:

"Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity."

INT. REV. CODE § 182:

"In computing the net income of each partner, he shall include, whether or not distribution is made to him—

"(a) As part of his gains and losses from sales or exchanges of capital assets held for not more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for not more than 6 months.

"(b) As part of his gains and losses from sales or exchanges of capital assets held for more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for more than 6 months.

"(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183 (b)."

INT. REV. CODE § 1141(a):

"(a) Jurisdiction.—The courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254

of title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in Civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of title 28 of the United States Code."

APPENDIX B

I.

Facts of *Weizer* v. *Commissioner,* 165 F. 2d 772 (C.C.A. 6th), reversing 6 T.C.M. 337.

The husband in 1907 began a business of buying and selling scrap metal under the name William Weizer & Co. For approximately three years he had a silent partner, but apart from that three-year period he conducted business as a sole proprietor until 1915, when he was married. At that time, his business was worth between $1,500 and $2,000. At the time of their marriage, the wife had $500 representing her premarital earnings. This sum she turned over to her husband, who deposited it in a bank and used it in the conduct of the business of William Weizer & Co. Subsequently and in 1920 or 1925 the wife turned over to her husband the proceeds, amounting to $1,100, of an endowment policy on her life. This sum was likewise deposited in a bank account and used in the business of William Weizer & Co. From the time of their marriage, the wife assisted the husband by doing office work required in the business and during 1941, the taxable year involved,

so assisted her husband on a full-time basis. The husband solicited business and disposed of scrap materials. The Tax Court, *6 T.C.M.*, 337, 338 to 341, on the evidence made the following evidentiary findings:

> 1. Prior to 1941 and up to the close of 1941, there was no oral or written partnership agreement between the husband and wife to conduct business as partners, and the only written partnership agreement was one purporting to be executed on January 1, 1941, but actually executed January 1, 1942.
>
> 2. The books of account of William Weizer & Co. never reflected a partnership status for the wife even in 1941.
>
> 3. Reports filed by William Weizer & Co., and certificates issued to it, by governmental authorities in the State of Ohio were all prepared in a manner indicating that it was an individual propretorship and the husband was the sole proprietor.
>
> 4. The principal bank account carried by William Weizer & Company was one in which either the husband or wife could draw checks, but that firm also maintained another small account on which only the husband could draw checks.
>
> 5. William Weizer & Co. first filed a partnership return in March, 1942, for the year 1941.
>
> 6. The husband filed a separate return for 1938, and the wife filed none; and petitioner and his wife filed joint returns for 1939 and 1940, and each filed separate returns for 1941, reporting one-half of the business income of the partnership.

On the basis of the evidentiary findings, the Tax Court drew, *6 T.C.M.* 337, 341, the following ultimate conclusions:

1. There was no oral or written agreement between husband and wife during 1941 or prior thereto to carry on business as partners.

2. The moneys made available to William Weizer & Co. in 1915 and 1920 or 1925 by the wife were not investments in the capital of that firm and were probably withdrawn.

3. The services of the wife were not vital additional services in the production of the income of the business, and the wife did not contribute substantially to the management of the business.

4. The husband and wife did not intend to carry on business as a partnership in 1941 or before.

5. William Weizer & Co. was a sole proprietorship, not a partnership, and the husband was the sole proprietor during 1941 and prior years.

II.

Facts of *Johnston* v. *Commissioner,* 180 F. 2d 355 (C.C.A. 6th), reversing 8 T.C.M. 198

At the time of his marriage to his wife in 1931, the husband was employed by Kelvinator Corporation, the business of which consisted of manufacturing, selling, installing and servicing refrigerators. The wife was first employed by Kelvinator Corporation, where her work consisted of being a clerk, checking orders, answering the telephone and billing and typing invoices. As a result

she became familiar with various parts and materials used in the installation of refrigerator equipment. The wife continued her employment with the Kelvinator Corporation for approximately a year after her marriage at which time she resigned and stayed at home and was occupied as a housewife.

On October 30, 1937, the husband was released from his employment with Kelvinator because of poor business conditions and was given severance pay amounting to $300. The wife then had no money or property of her own. She had, however, saved a small amount from "grocery money" which the husband had given her. Upon his release, the husband decided to go into business for himself, and he was then recognized as an exceptionally capable man in personally performing, as well as directing others in, the installation and repair of refrigeration equipment. Since the husband did not have the funds with which to carry out his purpose of going into business himself, he temporarily accepted employment at which he could earn money by working outside of the regular business hours of the business on which he was about to embark. This temporary employment continued until the spring of 1948. For some months prior thereto, he and his wife had discussed the organization of a separate business. On November 29, 1937, the husband had executed and filed an assumed name certificate in which he stated that he was conducting business under the assumed name of Johnston Refrigeration Construction.

When the husband discontinued his part-time employment, he continued to do business on a contract basis for his former employer. The wife encouraged the husband

to organize a separate business. She solicited customers and took charge of the small place of business which had been rented. Her work consisted of answering the telephone, keeping records, ordering supplies and handling matters with salesmen of companies supplying needed materials. In addition, since most of the husband's work was done at night after business hours, she would drive him from one job to another during the night and would sleep in the car while he was performing his work. After the completion of one job, the wife would drive the husband to the next job while he slept in the car and thus obtained some rest.

Shortly after the organization of the business, when it needed funds for the purchase of materials, the wife borrowed on two occasions sums aggregating $1000 from her mother, which sums were subsequently repaid out of the business.

The business of the Company expanded rapidly, and by 1941 it employed 11 men. In that year a contract was entered into between Johnston Refrigeration Construction and Kelvinator pursuant to which the latter appointed the former, an authorized service agency. This contract was in writing and signed by the husband alone. By 1942, the business employed a substantial number of employees, and at that time the general office affairs were turned over to one Smith. The wife continued to devote her attention to the business until the middle of 1943. Thereafter the wife discontinued her work at the office, although she went there occasionally and continued to discuss with the husband various matters in conection with the business. In May of 1944, the business opened a branch office which the

wife opened and operated alone. When the wife was employed full-time in connection with the business, her sister and mother took charge of her two children. Later she put the children in boarding school.

The husband and wife never executed a partnership agreement until July 1, 1944, and until that time the business continued to be registered as a sole proprietorship, of which the husband was the sole proprietor. On July 1, 1944, the husband and wife filed a partnership certificate stating that they intended to carry on the business of Johnston Refrigeration Construction as partners. On the same day the husband and wife executed a partnership agreement pursuant to which they stated that they were equal copartners in that business and had contributed equally to its capital. By contemporaneous written instrument, the husband transferred a half interest in the business and its assets to the wife. Appropriate gift tax returns were filed with respect to this transfer.

Prior to July 1, 1944, the husband had filed individual income tax returns in which he had reported all of the income from the business, except in 1942, when the husband and wife filed a joint return in which all of the income from the business was included but which contained no indication that the wife had any interest in this income. No partnership returns were filed prior to the partnership return which was filed for 1944. The husband and wife both filed individual income tax returns for 1944. In the husband's return all of the income of the business up to July 1, 1944, was reported and one-half of the income of that business after that date. In the wife's return, she reported one-half of the income of the business after July

1, 1944. In the partnership return, depreciation was claimed on the property used in the business for the period from July 1, 1944, to December 31, 1944. In the husband's individual income tax return, the husband claimed depreciation for the period prior to July 1, 1944.

Prior to July 1, 1944, the books and records of the business reflected no partnership status for the wife, and before that date the wife drew nothing from the business. On July 1, 1944, the books and records were changed to reflect a capital interest in the wife. Prior thereto the books and records reflected a capital interest only in the husband, and all of the surplus of the business was credited to him.

The Commissioner did not challenge the allocation of one-half of the income of the Company to the wife after July 1, 1944. He did, however, contend that the entire net income of the business for the calendar years 1942 and 1943, and for that part of the calendar year 1944 prior to July 1st of that year, was taxable to the husband alone on the ground that no valid partnership existed prior to the latter date. In this connection, he was sustained by the Tax Court, *8 T.C.M. 198.* The Court of Appeals for the Sixth Circuit unanimously reversed the Tax Court's decision in this regard.

III.

Facts of *Wenig* v. *Commissioner*, 177 F. 2d 32 (C.C.A. D.C.), reversing *6 T.C.M. 1340.*

The husband and wife were married in 1927 at which time the husband was employed as a foreman in a manufacturing concern. The wife was employed as a billing clerk in a cotton converting concern at the time of her marriage. The husband was foreign-born and attended night school (presumably high school) for two years, while the wife was a high school graduate. The Tax Court found that in order to help the husband get started in business *for himself* the wife in 1927 gave the husband her engagement ring to pawn. The husband borrowed $350 on the ring and with it bought some second hand machines which the husband and wife repaired. At the end of 1927 the husband left his employment and embarked in business with those machines with one, DiBianco, as a partner. Within a year DiBianco left the business. Shortly after her marriage the wife obtained employment as a bookkeeper and sales clerk in which she continued until 1930, devoting her earnings to paying living expenses. The Tax Court also found that the wife did clerical work, billing and bookkeeping for her husband's business in the evenings. The wife never rendered services to this business on a full-time basis, and after 1930 the wife rendered no regular services to the business, though she made valuable suggestions concerning its products after that date, the last being made in 1938. *6 T.C.M., 1340, 1343.* In 1931 or 1932 the husband and one Williams formed a corporation to which the business was transferred. In 1932 or 1933 the

husband bought out Williams' interest for $200 in cash, advanced by the wife, and $1,000 in trade. After the purchase, and in 1933, a creditor levied on the assets for an unpaid bill of $52.50. At the sale pursuant to this levy, the assets of the corporation were purchased by the husband for $100 advanced by the wife. Thereafter the business was conducted in non-corporate form.

In 1937 the husband acquired land and a building in which the business thereafter was conducted, title to which was in the husband's name alone and which was purchased with the funds of the business. In September of 1937, the husband and wife had an attorney prepare a Partnership Agreement to be effective as of February 1, 1937, and a certificate to the effect that the husband and wife were doing business under the assumed name of D. & W. Metal Products Company. These documents were, however, never executed.

In 1935, the husband sought a bank loan, at which time the bank was informed that the D. & W. Metal Products Company was a partnership ,and as a result the bank required of the wife a guaranty of any loans made to that Company. The wife was, however, never authorized to draw checks on the bank account of the business before April of 1941. On February 1, 1941, the husband and wife, for the first time, executed a formal partnership agreement. Until February 1, 1941, the books of account never reflected a partnership status, and a balance sheet prepared as of January 31, 1941, showed the husband as the sole proprietor.

The husband reported his income on a fiscal year basis ending January 31st. For all fiscal years ending in the

years 1934 to 1941, both inclusive, the husband reported all of the income of the D. & W. Metal Products Company in his individual income tax return. No partnership returns were ever filed except one for the fiscal year ended January 31, 1942 (which was the taxable year in question), in which the husband and wife were listed for the first time as equal partners in the above-named business. As late as the third quarter of 1942, the Employer's Tax Returns were filed showing the above-named Company to be an individual proprietorship.

The evidentiary facts stated above are those found by the Tax Court in the *Wenig* case from which it drew the following ultimate conclusions:

> 1. The advances made by the wife to the husband did not represent investments by her in the business of the challenged partnership. *6 T.C.M.* 1342.
>
> 2. The services rendered by the wife were not services rendered as a partner. *6 T.C.M.* 1343.
>
> 3. The husband and wife did not intend to engage in business together as copartners. *6 T.C.M.* 1343.
>
> 4. The challenged partnership was not a valid partnership, recognizable as such for Federal Income Tax purposes. *6 T.C.M.* 1342.

IV.

Facts of *Singletary* v. *Commissioner,* 155 F. 2d (C.C.A. 5th), reversing *5 T.C.* 365.

The husband and wife were married in 1929, before and after which time the wife worked as a secretary and teacher, and the husband ran a filling station. With the joint earnings of the husband and the wife, amounting to $300 or $400, and a loan from the husband's father of $1,000, the husband purchased a filling station. Thereafter the wife kept the books, looked after collections and attended the office. The filling station was purchased in May, 1936, and for the next three years the wife rendered services of the kind described. During 1939 the wife expected a baby and discontinued working at the filling station and thereafter worked only intermittently. On January 3, 1939, the husband executed a document in which he purported to transfer to his wife by way of gift a half interest in his filling station business. A gift tax was paid on the transfer evidenced by that document. The taxable years 1940 and 1941 were involved, in which year appropriate partnership returns were filed and separate returns were filed by the husband and wife in which each reported one-half of the income of the filling station business.

V.

Facts of *Walsh* v. *Shaughnessey*,
77 F. Supp. 577 (D.C.N.D., N.Y.)

The husband prior to October of 1925 was employed in the delivery and express business. At that time the wife, who was then the husband's fiancee, discussed the purchase of the business of the husband's employer. In June of 1926 the husband and wife were married, and shortly prior thereto the purchase of the business of the husband's employer was made for $1500. About two-thirds of the purchase price was paid before the husband and wife were married. Prior to her marriage the wife was employed as a telephone operator, and she continued in that employment after her marriage until 1930, after which she devoted her full time to the business which was acquired as above indicated. Until 1930 the wife devoted only a portion of her time to that business. Up until 1930 she was paid a salary which was accrued but which she never withdrew and which continued to be used in the conduct of the business. The business of the Company, which was conducted under the name Walsh Trucking Service, expanded. The wife had charge of the office of the Company and supervised the work of office employees. The husband performed and supervised the labor of outside employees engaged in the physical operation of the business. The books of account never reflected any partnership status for the wife. All bank accounts were carried in the name of husband and wife subject to withdrawal upon the check of either, but no bank account was main-

tained in the firm name. In 1935 a certificate of doing business under an assumed name was filed in which the husband certified that he was the sole owner of the business of the Walsh Trucking Company. All automobiles used in the conduct of the business were registered in the name of Walsh Trucking Service, Michael F. Walsh (the husband) Owner. Reports to regulatory bodies were made over a period of years which indicated that the husband was sole owner of the Walsh Trucking Company. Income Tax returns were filed to the same effect. Mrs. Walsh had full knowledge of the existence of such papers and reports and in fact took part in their preparation. The validity of the partnership for the taxable years 1941 to 1943, both inclusive, was involved.

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